Tri-Maintenance & Contractors, Inc. *and* Local 32B, Service Employees International Union, AFL-CIO *and* Local 32J, Service Employees International Union, AFL-CIO. Cases 2-CA-14395 and 2-CA-14396

July 27, 1981

SUPPLEMENTAL DECISION AND ORDER

On April 10, 1981, Administrative Law Judge D. Barry Morris issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Tri-Maintenance & Contractors, Inc., New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge: On April 12, 1978, the Board issued a Decision and Order[1] directing Tri-Maintenance & Contractors, Inc., herein Respondent, to make whole 18 employees, herein the discriminatees, for their losses resulting from the unfair labor practices found to have been committed by Respondent.

A controversy having arisen over the amount of backpay due each discriminatee, on April 21, 1980, the Regional Director for Region 2 issued a backpay specification and notice of hearing. Respondent filed its answer to the specification on May 5, 1980.

A hearing was held before me in New York, New York, on October 6, 23, and 24, and November 5 and 19, 1980.[2] All parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by the General Counsel, Respondent, and the Charging Parties.

Upon the entire record in the case, including my observation of the witnesses, I make the following:

FINDINGS OF FACT

A. *Background*

In its Decision the Board found that Respondent engaged in unfair labor practices by its refusal to hire those individuals who were providing cleaning and maintenance services at an office building located at 280 Broadway, New York, New York, herein 280 Broadway, immediately prior to the commencement of operations there by Respondent. The Board ordered that Respondent offer to reinstate 18 individuals and make them whole for any losses they may have suffered by reason of the discrimination against them.

The backpay specification alleged the backpay period to run from July 12, 1976, to May 17, 1978, and utilized as the measure of gross backpay the earnings of replacement employees during the backpay period. The gross backpay calculated in the specification for the 18 discriminatees totaled $91,318.

Respondent's answer to the specification admitted the dates of the backpay period and acknowledged the mathematical accuracy of the calculations contained in the appendices. However, the answer denied the appropriateness of the measure of gross backpay as provided in the specification.

B. *Gross Backpay*

The specification computed the total gross backpay to be $91,318. This was the amount earned by Respondent's employees, herein the replacements, who provided cleaning and maintenance services at 280 Broadway during the backpay period. The earnings of these replacements were determined from payroll records provided by Respondent for 12 individuals identified by Respondent as its employees who performed the above-mentioned services.

While Respondent concedes that these 12 replacements worked at 280 Broadway during the backpay period it contends that the replacements also worked at other locations. These locations included two in Manhattan (49 Chambers Street and 215 W. 125th Street) and two in New Jersey (Bloomfield and Livingston). Respondent contends that total expenditures for the time spent in servicing 280 Broadway amounted to $20,310.

Marvin Steinberg, vice president and treasurer of Respondent, testified that he arrived at the amount of $20,310 by an examination of timesheets which listed the hours and days when the replacements' time was allocated to various facilities serviced by Respondent. Steinberg testified that he had no knowledge of who recorded the information on the timesheets, nor did he know who in the Company possessed such information. He also testified that he had no personal knowledge of the hours worked by the replacements at 280 Broadway.

[1] 235 NLRB 895.

[2] Respondent has requested that "the Administrative Law Judge adopt and recommend the terms of the settlement heretofore voluntarily reached by the involved parties." While settlement negotiations did take place the parties were unable to agree on a settlement. Sec. 101.9 of the Board's Rules and Regulations provides that the Administrative Law Judge may accept a settlement where agreed to by the parties. Since there was no agreement of settlement in this case, I am denying Respondent's request.

According to the sheets, employees worked at as many as four different facilities during a 6-hour workday. These facilities included the two located in lower Manhattan, the third at 125th Street, and the fourth at Bloomfield or Livingston, New Jersey, approximately 25 to 30 miles away from 280 Broadway. The timesheets for one of the replacements, Dorothy Reese, show that during May 1977 on a number of days she worked 2 hours at 49 Chambers, 2 hours at 280 Broadway, 1 hour at 125th Street, and 1 hour in New Jersey. Similarly, her April 1977 timesheet shows that on a number of days she worked 2 hours at 49 Chambers, 1 hour at 280 Broadway, 2 hours at 125th Street, and 1 hour in New Jersey.

Steinberg further testified that after June 1978, which coincides with the date when the discriminatees were placed on a preferential hiring list by Respondent, the replacements were no longer required to work in New Jersey. Respondent found it more "feasible" not to have its employees travel between the New York and New Jersey locations.

I find the above timesheets to be unreliable indicators of the time actually spent at the various locations. Respondent produced no one to authenticate the documents. Indeed, Steinberg conceded that he had no personal knowledge of the hours worked by the replacements and did not know who recorded the information on the timesheets. I find it unbelievable that an employee would have worked 2 hours each in two different locations in downtown Manhattan, traveled uptown to work 1 hour at another location, and in addition travel 25 to 30 miles to work at another location in New Jersey—all within a 6-hour period.

I believe that these timesheets were not reflections of actual time spent at various locations but instead were "allocations" of time for accounting purposes. This is corroborated by Steinberg's testimony:

> From what my understanding was in going back into our records . . . the way the managers and the supervisors had put down their hours was to put the time that was allocated to the building which does not necessarily mean that they actually, physically worked two hours in a building, or one hour in a building, or four hours in a building, or eight hours in a building . . . .
>
> Q. . . . Could you at least tell us whether the person on that one night actually worked in those four buildings?
>
> A. I couldn't say by looking at this thing whether she worked in those four building during that day and night.

Counsel for Respondent called 13 of the discriminatees as witnesses. He attempted to show that they would not have accepted jobs which required their traveling to New Jersey. However, 10 of the discriminatees testified that they would have taken the jobs even if travel to New Jersey was required. While Respondent's counsel attempted to show that transportation would not have been available to most of the discriminatees, in fact, Respondent itself provided transportation to the replacements. Respondent's president testified that the manager at 280 Broadway took the replacements "around in a truck from job to job."

Respondent's contention as to the possible unwillingness of the discriminatees to work in New Jersey is mere speculation. As was stated in *Atlantic Marine, Inc., and Atlantic Drydock Corporation*, 211 NLRB 230, 233 (1974):

> [W]hat would have happened had the Company not discharged the man is . . . now pure speculation. All we know with certainty is that Boggs stopped work here because the Company forced him to it. If the Respondent wished to take advantage of what it now assumes as predictable probability, all it had to do was simply let nature take its course, and not commit unfair labor practices.[3]

I find that the specification contains the appropriate measure of gross backpay. As the court said in *N.L.R.B.* v. *Brown & Root, Inc., etc.*, 311 F.2d 447, 452 (8th Cir. 1963):

> [I]n many cases it is difficult for the Board to determine precisely the amount of back pay which should be awarded to an employee. In such circumstances the Board may use as close approximations as possible, and may adopt formulas reasonably designed to produce such approximations.

The specification utilized the earnings of the replacement employees to measure the gross backpay. This is a reasonable method and is one of the traditional methods used by the Board in backpay cases. See *Amshu Associates, Inc., and Spring Valley Garden Associates; and Sam Halpern and Mark Weidman, a Co-partnership, d/b/a Kennedy Realty Company*, 234 NLRB 791, 795 (1978).

I find Respondent's contention that the gross backpay should be limited to the sum of $20,310 to be without merit. As stated above, I find the timesheets on which Respondent relied in arriving at the sum of $20,310 to be unreliable.[4] While no doubt the replacements spent some of their time working at locations other than 280 Broadway, the record contains no accurate figures as to how much time was spent in such locations. In addition, had the discriminatees been hired for the jobs at 280 Broadway there is no reason to suppose that they also would not have worked part of the time at the other locations and, accordingly, have earned the amount earned by the replacements. As noted earlier, the building manager transported the replacements from job to job. Certainly

[3] See also *Flora Construction Company and Argus Construction Company d/b/a Flora and Argus Construction Company*, 149 NLRB 583, 585 (1964), enfd. 354 F.2d 107 (10th Cir. 1965).

[4] Other evidence in the record also points to the likelihood that more than $20,310 was spent on cleaning services at 280 Broadway during the backpay period. Thus, Steinberg testified that the City of New York paid Respondent $185,799 for cleaning services for each of the 2 years of the backpay period. It is unlikely that Respondent expended only $10,155 each year as wages for such services. In addition, the record shows that 280 Broadway is a seven-story building with over 150 separate office areas and considerable public space. Prior to 1976, cleaning required 16–18 full-time employees. If, however, Respondent spent only $20,310 on wages for cleaning, as described in the record, a mere 38.1 hours of cleaning would have been performed each week during the backpay period. This is highly unlikely.

the same arrangement would have existed for the discriminatees. In addition, most of the discriminatees testified that they would have accepted the jobs even though some work in New Jersey was required. They testified to that effect despite the false impression that they would have had to provide their own transportation.

As noted above, the General Counsel's calculation of $91,318 as the total gross backpay was based on the earnings of the replacements who worked at 280 Broadway during the backpay period. I find this calculation to be reasonable and proper.

C. *Interim Earnings*

The General Counsel made available to Respondent for examination at the hearing 13 of the 18 discriminatees. The 13 discriminatees who were called by Respondent to testify with respect to their interim earnings were Roberto Burgos, Margie Dones, Castulo Guerrero, John Kelk, Joseph Korzonek, Anna Kuzyk, Lois McClary, Vincent Natale, Zenobia Sobczak, Alexander Struszcyzk, Jadwiga Wesolowska, Barbara Wesolowski, and Wladyslawa (Storak) Ziemba.

With the exception of Guerrero, no testimony was elicited by Respondent which established that the interim earnings of the discriminatees differed from the interim earnings as set forth in the appendixes to the backpay specification. The testimony of Guerrero established that his interim earnings for the third and fourth quarters of 1977 were incorrectly set forth in the backpay specification, which was then amended to correctly reflect those earnings. Except for Natale, no testimony was obtained by Respondent to prove that the discriminatees, at all times during the backpay period when unemployed, were not available for, or did not seek, employment. The discriminatees who were examined by Respondent in regard to their availability or search for work testified that they were so available and made efforts to seek employment.

Natale testified that he unsuccessfully looked for work for a period of several months after July 1976 and collected unemployment insurance for about 4 or 5 months. During 1977, he commenced receiving a pension from Locals 32B-32J, Service Employees International Union, AFL-CIO, in addition to social security payments, and withdrew from the job market. In this connection the parties filed a stipulation and request to the Administrative Law Judge for receipt of a post-hearing exhibit in which the parties stipulated that Natale commenced receiving a union pension on February 1, 1977. The exhibit is hereby received.

Prior to the hearing four of the discriminatees, *viz*, Elena Aiello, Joseph Brando, Jr., Roman Morales, and Ryszard Mieczisowski, had not been located by the Board's compliance officer. Therefore their interim earnings, if any, had not been determined and they were not made available for examination by Respondent in regard to this matter. The General Counsel moved that the backpay due to these four discriminatees, as reflected in the backpay specification, be placed in escrow for a period of 1 year, or 2 years if the Regional Director of Region 2 deems necessary; or until Respondent is afforded an opportunity to examine the discriminatees in regard to their interim earnings.

Discriminatee Helen Turner had been contacted by the compliance officer and her interim earnings had been determined as set forth in the backpay specification. However, at the time of the hearing Turner was residing out of State and, thus, was not made available by the General Counsel for examination by Respondent. Respondent first agreed to examine Turner by means of interrogatories. Subsequently, however, during the course of the hearing, Respondent decided that rather than submit interrogatories to Turner it would take the position that she had been made available to Respondent for examination.

I find that the interim earnings of Burgos, Dones, Guerrero, Kelk, Korzonek, Kuzyk, McClary, Sobczak, Struszcyzk, Jadwiga Wesolowska, Barbara Wesolowski, and Ziemba are accurately set forth in the backpay specification, as amended. Respondent offered no evidence that the discriminatees did not "make reasonable efforts to find interim work." *N.L.R.B.* v. *Miami Coca-Cola Bottling Company*, 360 F.2d 569, 575-576 (5th Cir. 1966). Nor did Respondent demonstrate that their interim earnings differed from those shown in the amended backpay specification. "[T]he burden is upon the employer to establish facts which would negative the existence of liability to a given employee or which would mitigate that liability." *N.L.R.B.* v. *Brown & Root, Inc., supra*, 311 F.2d at 454. See also *Aircraft and Helicopter Leasing and Sales, Inc.*, 227 NLRB 644, 646 (1976).

Concerning Turner, since Respondent agreed to consider her as having been made available for examination, I find that her interim earnings also are correctly set forth in the backpay specification.

As to Natale, the parties have stipulated that he began receiving a union pension on February 1, 1977. The General Counsel concedes in its brief that entitlement to backpay is terminated on that date. Attached as Appendix A is the computation of backpay for Natale, revised to reflect termination of payments on February 1, 1977, which I find correctly sets forth the interim earnings and backpay due Natale. [Appendix A omitted from publication.]

With respect to Aiello, Brando, Morales, and Mieczisowski, the General Counsel has moved that their backpay be paid by Respondent to the Regional Director for Region 2 who will hold it in escrow. Where discriminatees are unavailable so that their interim earnings have not been determined and Respondent has not had the opportunity to examine them on their willful loss of earnings, the Board traditionally follows the policy of having their gross backpay as originally set out in the backpay specification paid by Respondent to the Regional Director who shall hold it in escrow for a period of 1 year, at the end of which the Regional Director may apply to the Board for a second year if deemed necessary. During this period the Regional Director shall make suitable arrangements to afford Respondent opportunity to examine the missing discriminatees, as they become available in regard to their interim earnings. Where deductions are found to be warranted, the amount so deducted will be

returned to Respondent. *No Ho's Unique Clothing Warehouse, Inc., etc.*, 246 NLRB 537 (1979); *Controlled Alloy, Inc. and Harlin Precision Steel Metal Fabrication Co., Inc.*, 208 NLRB 882, 884 (1974). Accordingly, the General Counsel's motion that the backpay be held in escrow in accordance with the above procedure is granted.

On the basis of the foregoing findings of fact, and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[5]

The Respondent, Tri-Maintenance & Contractors, Inc., New York, New York, its officers, agents, successors, and assigns, shall:

1. Pay to each of the following employees as net backpay the amount set forth opposite each name, plus interest computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977),[6] less tax withholdings required by Federal and state laws:

Roberto Burgos	$4,406
Margie Dones	5,074
Castulo Guerrero	2,929
John Kelk	5,074
Joseph Korzonek	5,074
Anna Kuzyk	2,967
Lois McClary	3,944
Vincent Natale	1,625
Zenobia Sobczak	3,421
Alexander Struszcyzk	1,418
Helen Turner	2,741
Jadwiga Wesolowska	4,089
Barbara Wesolowski	5,074
Wladyslawa (Storak) Ziemba	800

2. Transmit to the Regional Director for Region 2, to be held in escrow as provided in this Supplemental Decision, the gross backpay amounts contained in the backpay specification, for the following employees in the specified amounts, plus interest,[7] and less tax withholdings required by Federal and state laws:

Elena Aiello	$5,074
Joseph Brando, Jr.	5,074
Roman Morales	5,074
Ryszard Mieczisowski	5,074

[5] In the event no exceptions are filed as provided in Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[6] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716, 717-721 (1962).

[7] As specified in par. 1 of this Order.